

Before the
Federal Communications Commission
 Washington, D.C. 20554

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Federal Communications Commission
 Office of Secretary

In the Matter of)	
)	
Amendment of Section 73.202(b))	MB Docket No. 04-319
Table of Allotments,)	RM-10984
FM Broadcast Stations.)	
(Coal Run, Kentucky and Clinchco, Virginia))	

To: Assistant Chief, Audio Division

RESPONSE TO NOTICE OF PROPOSED RULE MAKING
AND
ORDER TO SHOW CAUSE

Dickenson County Broadcasting Corp. ("DCBC"), licensee of WDIC-FM, Channel 221A, at Clinchco, Virginia, by its attorneys, and pursuant to 47 U. S. C. Section 316(a), and Sections 1.87, 1.415 and 1.419 of the Commission's Rules hereby shows why its license for WDIC-FM should not be modified as proposed in the Audio Division's *Notice of Proposed Rule Making and Order to Show Cause*, DA 04-2501, released August 12, 2004 ("*Show Cause Order*"),¹ The Audio Division issued the *Show Cause Order* at the request of East Kentucky Broadcasting Corp. ("Petitioner"), licensee of Station WPKE-FM, Channel 276A, Coal Run, Kentucky, proposing the substitution of Channel 221C3 for Channel 276A at Coal Run, and the modification of Station WPKE-FM's license accordingly. To accommodate the upgrade, Petitioner also proposed the substitution of Channel 276A for Channel 221A at Clinchco, Virginia, and the modification of Station WDIC-FM's license accordingly. DCBC opposes the proposed modification. The change proposed by Petitioner cannot be effectuated. This pleading constitutes DCBC's written statement

¹ Comments are due by October 4, 2004, so this Response is timely filed. This response is supported by the attached Declaration of the president of DCBC.

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showing with particularity why its license should not be modified as proposed in the *Show Cause Order*. In opposition, DCBC shows the following:

Petitioner stated that the proposal is an “incompatible channel swap” since the channel swap between Stations WPKE-FM and WDIC-FM is the only way to effectuate the upgrade at Coal Run, Kentucky. However, Petitioner’s proposal cannot be effectuated because there is a major terrain obstruction between Coal Run and the hypothetical allocation reference site.

Attached hereto as Attachment A, and incorporated herein by reference, are Technical Comments showing that using the 30 second terrain database, WPKE-FM would have line-of-sight to Coal Run, Kentucky, its community of license. However, the Technical Comments show that, using the **3 second terrain database**, there is a major terrain obstruction located at 10.57 kilometers (6.57 miles) from the hypothetical allocation reference site (See Exhibit #1 to the Technical Comments). This mountain peak prohibits line-of-sight service between Petitioner’s hypothetical allocation reference and Coal Run. This study was conducted from the elevation of the hypothetical allocation reference taken from the Petitioner’s petition for rule making. The Technical Comments show that the proposed tower at the hypothetical reference site would be 209 meters (686 feet) tall. The Technical Comments state that this is abnormally high for a Class C3 broadcast facility and still does not provide line-of-sight clearance.

There is more. The Technical Comments include as Exhibit #2 a depiction of the Petitioner’s 310.97 degree radial plotted over a portion of the Millard, Kentucky, Quadrangle 7.5 minute topographic map. The mountain peak at 10.57 kilometers from the allocation site agrees with Exhibit #1, confirming the existence of the terrain obstruction.

Section 73.315 (b) of the Commission’s Rules provides:

The location of the antenna should be so chosen that line-of-sight can be obtained from the antenna over the principal city or cities to be served; in no event should there be a major obstruction in this path.

If the facts of this case seem familiar to the Audio Division, they should. On similar grounds, Petitioner successfully objected to DCBC's one-step application to upgrade WDIC-FM from Class A to Class C3. In its letter dated December 13, 2003, dismissing DCBC's application (copy attached as Attachment B), the Audio Division cited *Creswell, Oregon*, 4 FCC Rcd 7040 (1989) and *Jefferson City, Cumberland Gap, Elizabethton, TN and Jonesville, VA*, 13 FCC Rcd 2303 (1998), in which the Commission denied proposals for new allotments due to the presence of terrain obstructions. The Petitioner's technical consultant in that case used the Commission's 3-second terrain database (Communications Data Systems RFCAD) to support its objection; thus, it can hardly be heard to object when DCBC's technical consultant employs a 3-second database.

The Audio Division stated that "terrain obstacles can be considered where the obstacle would affect coverage of the community of license." The Audio Division letter cited *San Clemente, California*, 3 FCC Rcd 6728 (1988), *appeal denied sub nom. Mount Wilson FM Broadcasters, Inc., v. FCC*, 884 F.2d 1462 (D.C. Cir. 1989) for the proposition that "We will not allot a channel where a properly spaced site is technically infeasible. While the Commission generally presumes in rule making proceedings that a technical feasible site is available, that presumption is rebuttable." DCBC has rebutted the presumption that a technically feasible site is available for use by WPKE-FM.


So, it appears that Petitioner is hoist on its own petard. The Audio Division refused to grant DCBC's application on the grounds of terrain obstruction. DCBC has shown that Petitioner's allocation site is technically infeasible because of a similar terrain obstruction. Petitioner's petition for rule making must be dismissed as a result.

WHEREFORE, in light of the foregoing, DCBC has shown with particularity why its license for WDIC-FM should not be modified as proposed, and DCBC requests the Audio

Division to dismiss Petitioner's petition and to terminate this proceeding without modifying DCBC's license.

Respectfully submitted,

**DICKENSON COUNTY
BROADCASTING CORP.**

By: 

Gary S. Smithwick
Its Attorney

Smithwick & Belendiuk, P.C.
5028 Wisconsin Avenue, NW
Suite 301
Washington, DC 20016
202-363-4560

October 4, 2004

ATTACHMENT A

Technical Comments

MB Docket No. 04-319

RM-10984

September 2004

These Technical Comments are being filed on behalf of Dickenson County Broadcasting Corp. ("Dickenson"), licensee of WDIC-FM, Clinchco, Virginia in opposition to Petition for Rule Making MB Docket No. 04-319, RM-10984 filed by East Kentucky Broadcasting Corp. ("East Kentucky"), licensee of WPKE-FM, Coal Run, Kentucky. East Kentucky proposes to swap the WPKE-FM Channel 276A for the WDIC-FM Channel 221A and upgrade WPKE-FM to a Class C3 facility.

In the Petition for Rule Making, East Kentucky's hypothetical allocation reference site is North Latitude 37-23-57 and West Longitude 82-23-42. In Exhibit E-2 of the Rule Making, East Kentucky shows that from the hypothetical allocation reference, using the 30 second terrain database, WPKE-FM would have line-of-sight to Coal Run, Kentucky, its community of license. However, we find that using the 03 second terrain database, there is a major terrain obstruction located at 10.57 kilometers (6.57 miles) from the hypothetical allocation reference site. This mountain obstruction is shown in the Dickenson Line-of-Sight Profile in Exhibit #1.

In cases where computer terrain databases disagree, issues are settled using 7.5 minute topographic maps. Exhibit #2 indicates the East Kentucky 310.97 degree radial plotted over a portion of the Millard, Kentucky Quadrangle topographic map. The mountain peak at 10.57 kilometers from the hypothetical allocation reference in the Dickenson Line-of-Sight Map, Exhibit #2 agrees with the Dickenson Exhibit #1. This

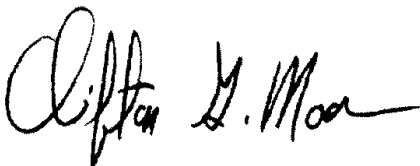
mountain peak prohibits line-of-sight between the East Kentucky hypothetical allocation reference and Coal Run, Kentucky.

This study was conducted from 744 meters COR AMSL, the identical elevation of the hypothetical allocation reference taken from the East Kentucky Rule Making request. East Kentucky chose this elevation in a failed attempt to obtain line-of-sight clearance to the city of license. From the East Kentucky Exhibit E-2 it is quickly derived that the proposed tower height at the hypothetical reference site would be 209 meters (686 feet) tall. This is abnormally high for a Class C3 broadcast facility and still does not provide line-of-sight clearance.

Section 73.315 (b) states:

"The location of the antenna should be so chosen that line-of-sight can be obtained from the antenna over the principal city or cities to be served; in no event should there be a major obstruction in this path."

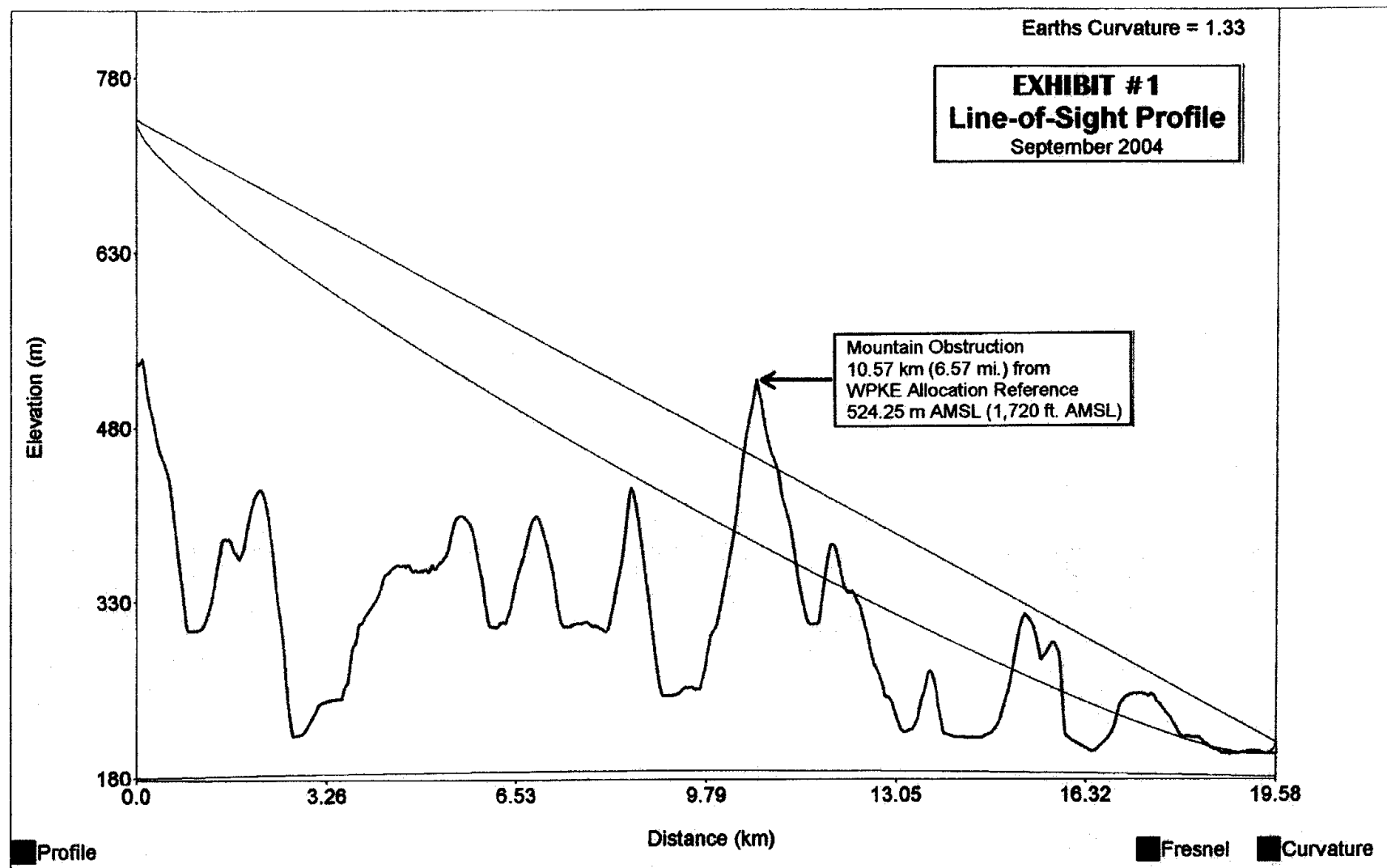
Through these comments, Dickenson County Broadcasting Corp. has demonstrated that East Kentucky does not have line-of-sight to Coal Run, Kentucky. This was developed through use of the 03 second database and confirmed utilizing the Millard, Kentucky Quadrangle 7.5 minute USGS topographic map. Because the East Kentucky hypothetical allocation reference site is substandard, not satisfying the requirements of §73.315 (b), Rule Making Proposal MB Docket No. 04-319, RM-10984 should be denied.

A handwritten signature in black ink, appearing to read "Clifton G. Moor". The signature is fluid and cursive, with the first name "Clifton" being more prominent than the last name "Moor".

September 21, 2001

Clifton G. Moor
Bromo Communications, Inc.

Line of Sight Study - Proposed WPKE to Coal Run, KY



Starting Latitude: 37-23-57 N
 Starting Longitude: 082-23-42 W

End Latitude: 37-30-53 N
 End Longitude: 082-33-44 W

Distance: 19.580150498 km
 Bearing: 310.970 deg

Transmitter Height (AG) = 209.0 m
 Receiver Height (AG) = 9.1 m

Transmitter Elevation = 535.0 m
 Receiver Elevation = 199.9 m

Frequency = 92.1 MHz
 Fresnel Zone: 0.6

**Millard Quadrangle
Kentucky**

Mountain Obstruction
10.57 km (6.57 mi.) from
WPKE Allocation Reference
524.25 m AMSL (1,720 ft. AMSL)

Path from WPKE Allocation Reference to Coal Run, KY (310.97°)

EXHIBIT #2
Line-of-Sight Map
September 2004

ATTACHMENT B

FEDERAL COMMUNICATIONS COMMISSION

445 12th Street SW
WASHINGTON DC 20554

MEDIA BUREAU
AUDIO DIVISION
TECHNICAL PROCESSING GROUP
APPLICATION STATUS: (202) 418-2730
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PROCESSING ENGINEER: Dale Bickel
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December 18, 2003

Mr. Gary S. Smithwick
5028 Wisconsin Avenue NW, Suite 301
Washington, D.C. 20016

Mr. John F. Garziglia
Womble Carlisle Sandridge & Rice, PLLC
1401 I Street NW, 7th Floor
Washington, D.C. 20005

In re: WDIC-FM, Clinchco, VA
Dickenson County Broadcasting Corp.
Facility ID No. 16905
CP Application BPH-

Dear Mr. Smithwick and Mr. Garziglia:

The referenced application filed by Dickenson County Broadcasting Corp. ("Dickenson") seeks a one-step upgrade from Class A to Class C3 for WDIC-FM, Clinchco, VA. The proposed Class C3 allotment reference site is located at a different site than the location from which WDIC-FM intends to broadcast. East Kentucky Broadcasting Corp. ("East Kentucky"), licensee of WPKE-FM, Elkhorn City and WDLR (AM), Pikesville, KY, has filed an informal objection seeking denial of this application.

East Kentucky states that a major terrain obstruction exists between the proposed Class C3 allotment reference site and Clinchco. Even with a tower height of 1,000 feet above ground level, the terrain obstruction would still be in excess of 200 meters above the line-of-sight between transmitter site and community of license. East Kentucky cites two allotment cases (*Creswell, Oregon*, 4 FCC Rcd 7040 (1989); *Jefferson City, Cumberland Gap, Elizabethton, TN and Jonesville, VA*, 13 FCC Rcd 2303 (1998)) in which the Commission denied proposals for new allotments due to the presence of terrain obstructions. In light of these precedents, East Kentucky contends that the proposed allotment site fails to meet the Commission's FM allotment standards and must be denied.

In reply, Dickenson states that the Commission uses uniform terrain when considering new or modified FM allotments.¹ Dickenson faults East Kentucky's construction of *Jefferson City, Cumberland Gap, Elizabethton, TN and Jonesville, VA*, 13 FCC Rcd 2303 (1998), arguing that this case did not involve a one-step upgrade allotment site. Dickenson contends that the terrain issue is irrelevant inasmuch as the site is hypothetical only and Dickenson does not intend operations from that location. The proposed allotment reference site is said to be the only one at which the spacing requirements of 47 CFR Section 73.207 are fully met. Dickenson believes it has amply demonstrated circumstances that (in the event it is necessary) warrants waiver of Section 73.315(a).

Analysis. An essential part of the making of any allotment, be it through the rulemaking process or by a one-step upgrade application, is full coverage of the community of license by the 70 dBu service contour. In *FM Channel and Class Modifications by Application*, 8 FCC Rcd 4735 (1993), which adopted the one-step upgrade procedure, the Commission required that

¹ Dickenson cites to *Caldwell, College Station and Gause, Texas*, 15 FCC Rcd at 3322 and 3325.

an applicant must include a separate exhibit to the application which shows that the allotment reference site would meet allotment standards with respect to spacing and city grade coverage and that it would be suitable for tower construction. ... Generally speaking, examples of unsuitable allotment reference sites include those which are offshore, in a national or state park in which tower construction is prohibited, on an airport, or otherwise in an area which would necessarily present a hazard to air navigation.

8 FCC Rcd at 4737, note 10. While Dickenson is correct that the Commission generally considers proposed allotment sites without reference to terrain (i.e., assumes flat or uniform terrain), terrain obstacles can be considered where the obstacle would affect coverage of the community of license. *Cresswell, Oregon, supra*; *Jefferson City, Cumberland Gap, Elizabethton, TN and Jonesville, VA, supra*.² In such cases, the proponent may submit a showing to demonstrate that a site is, in fact, suitable for tower construction.

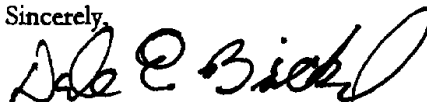
As stated in *Crestview and Westbay, Florida*, 7 FCC Rcd 3059 (1992):

The underlying requirement for an allotment is the reasonable expectation that a useable site is available in compliance with the minimum spacing requirements. We will not allot a channel where a properly spaced site is technically infeasible. Although the Commission generally presumes in rule making proceedings that a technically feasible site is available, that presumption is rebuttable. See *San Clemente, California*, 3 FCC Rcd 6728 (1988), *appeal denied sub nom. Mount Wilson FM Broadcasters, Inc. v. FCC*, 884 F.2d 1462 (D.C. Cir. 1989).³

Here, Dickenson has not submitted any information that would lead us to believe that the proposed allotment reference site could feasibly be used for an operation which could cover the community of license with a 70 dBu signal. We have no information suggesting that the FAA could approve a tower of sufficient height to clear the terrain obstruction. Nor has Dickenson cited any allotment case where an allotment was made despite the presence of a large intervening terrain obstruction. Finally, Dickenson has provided no information to show that any of the community of license would receive a 70 dBu signal when the terrain obstruction is considered. Consequently, the proposal is unacceptable for filing, and no waiver of Section 73.315(a) is warranted.

When an applicant seeks waiver of the rules, it must plead with particularity the facts and circumstances which warrant such action. *Columbia Communications Corp v. FCC*, 832 F.2d 189, 192 (D.C. Cir. 1987) (quoting *Rio Grande Family Radio Fellowship v. FCC*, 406 F.2d 644, 666 (D.C. Cir. 1968) (per curiam)). We have afforded Dickenson's waiver request the "hard look" called for under *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), but find that the facts and circumstances set forth in Dickenson's justification are insufficient to establish that granting waiver of Section 315(a) is in the public interest. Consequently, East Kentucky's informal objection IS GRANTED. Dickenson's request for waiver of Section 73.315(a) IS DENIED, and application BPH-20010502AAN, being unacceptable for filing, IS DISMISSED. This action is taken pursuant to 0.283.

Sincerely,



Dale E. Bickel
Senior Electronics Engineer
Audio Division
Media Bureau

cc: Dickenson County Broadcasting Corp.

² See also *Bald Knob and Clarendon, AR*, MM Docket 90-651, 6 FCC Rcd 7435 (1991); *Elkins, WV, Mountain Lake Park and Westernport, MD*, 7 FCC Rcd 5527, 5530 (1992).

³ See also *West Palm Beach, Florida*, MM Docket 87-438, DA-91-1421, 6 FCC Rcd 6975, 6976 ("[w]e will ... take into account a showing by a party that, in reality, no theoretical sites exist because of environmental, air hazard, or other similar considerations").

SUPPORTING DECLARATION

DECLARATION UNDER PENALTY OF PERJURY

Richard Edwards, under penalty of perjury, declares as follows:

I am president of Dickenson County Broadcasting Corp. ("DCBC"), licensee of WDIC-FM, Clinchco, Virginia.

I have reviewed a draft of DCBC's "Response to Notice of Proposed Rule Making and Order to Show Cause," and the statements made therein are true and correct to the best of my information and belief.

Executed this 04 day of October, 2004.



Richard Edwards


CERTIFICATE OF SERVICE

I, Sherry Schunemann certify that on October 4, 2004, copies of the foregoing Response to Notice of Proposed Rule Making and Order to Show Cause were sent via first class mail, postage pre-paid, to the following:

Ms. Sharon P. McDonald
Audio Division
Media Bureau
Federal Communications Commission
The Portals II
445 Twelfth Street, SW
Washington, DC 20554

Howard J. Barr, Esq.
Womble Carlyle Sandridge & Rice, PLLC
1401 Eye Street, NW, Suite 700
Washington, DC 20005
(Counsel for Petitioner)

* By hand


Sherry Schunemann